Boston Cement Masons and Asphalt Layers Union Local No. 534, a/w Operative Plasterers and Cement Masons International Association, AFL–CIO (Duron Maguire Eastern Corp.) ***and*** **Peter Frattaroli** ***and*** **Enrico Ventresca.** Cases 1–CB–2377 and 1–CB–2386

December 16, 1982

THIRD SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 28, 1982, Administrative Law Judge Bruce Nasdor issued the attached Decision in this proceeding. Thereafter, Respondent Union filed exceptions and a supporting brief. The General Counsel also filed a brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Boston Cement Masons and Asphalt Layers Union Local No. 534, a/w Operative Plasterers and Cement Masons International Association, AFL–CIO, its officers, agents, and representatives, shall take the action set forth in the said recommended Order.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

BRUCE C. NASDOR, Administrative Law Judge: This case was heard at Boston, Massachusetts, on January 11, 1982. On May 30, 1974, Administrative Law Judge John M. Dyer issued his original Decision in the above-entitled proceeding. Judge Dyer found that Respondent violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act (herein referred to as the Act). He recommended, *inter alia*, that the Respondent make the Charging Parties whole for any loss of pay or other loss "such as seniority, etc." which they suffered as a result of the discrimination against them. The Union appealed Administrative Law Judge Dyer's Decision and the Board dismissed the complaint in its entirety appearing at 216 NLRB 568 (1975). Thereafter, the Charging Parties filed a petition for review with the First Circuit of the United States Court of Appeals.

On December 18, 1975, the court, at 526 F.2d 1189, granted the petition for review, vacated the Order of the Board, and remanded the case. The Board reopened the record and a subsequent hearing was held before Administrative Law Judge Dyer. This hearing limited the proceeding to a determination of whether the Union operated a legitimate exclusive hiring hall. Administrative Law Judge Dyer reaffirmed his earlier Decision and Order, concluding that the Union did not operate an exclusive hiring hall.

The Board issued a Supplemental Decision and Order on April 10, 1978, reaffirming its prior Decision and Order.[1]

The Charging Parties again filed a petition for review with the First Circuit Court of Appeals. The court issued its decision on December 28, 1978,[2] in which it granted the petition for review and remanded the case back to the Board for the limited purpose of considering the appropriate relief.

On July 26, 1979, the Board adopted the recommended Order of Administrative Law Judge Dyer and issued its Second Supplemental Decision and Order, reported at 243 NLRB 712.

On November 2, 1979, the Court of Appeals for the First Circuit issued its decree granting the Board summary judgment and enforcing its Second Supplemental Decision and Order. The decree is in evidence as General Counsel's Exhibit 1(c).

On October 2, 1980, the Regional Director for Region 1 issued a backpay specification and notice of hearing. On October 8, 1980, the Union filed its answer to the backpay specification.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs, I make the following:

[1] See 235 NLRB 826.

[2] See 590 F.2d 15.

[1] Respondent has excepted to the standards for tolling backpay set forth in *Pen and Pencil Workers Union, Local 19593, AFL–CIO (Parker Pen Company)*, 91 NLRB 883 (1950), contending instead that *Sheet Metal Workers' Union Local 355, Sheet Metal Workers' International Association, AFL–CIO (Zinsco Electrical Products)*, 254 NLRB 773 (1981), and *Iron Workers Local 118, International Association of Bridge and Structural Iron Workers, AFL–CIO (Pittsburgh Des Moines Steel Company)*, 257 NLRB 564 (1981), should be applied. In applying *Pen and Pencil*, the Administrative Law Judge pointed out that the Board's Order (as well as court enforcement) and backpay specification both issued prior to the overruling of *Pen and Pencil* in 1981. Moreover, he found that Respondent failed to comply with the *Sheet Metal Workers* and *Iron Workers* standard of affirmatively requesting the employer to reinstate the charging parties. In these circumstances, we adopt the Administrative Law Judge's treatment.

[2] We agree with the Administrative Law Judge's application here of the interest standard set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977). As the Administrative Law Judge found, the Board refused to apply the *Florida Steel* standard where an earlier Board Order providing for a different interest rate had been enforced, in *Sargent Electric Company*, 234 NLRB 1292 (1978). However, in *Sargent Electric*, the Board Order issued prior to *Florida Steel*. Here, the Board's Order issued after *Florida Steel* and the failure to follow the *Florida Steel* standard in the Board's Second Supplemental Decision and Order that issued on July 26, 1979, was an inadvertent error.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In 1973, Turner Construction Company, a general contractor, was engaged in the construction of the Shawmut Bank project, a 40-story building, located in Boston, Massachusetts.

In July 1973, Duron Maguire Eastern Corporation (hereinafter referred to as the Employer), a subcontractor, commenced the pouring and finishing of cement.

Frattaroli and Ventresca (hereinafter referred to as the Charging Parties), journeyman cement masons, were employed by the Employer on July 3, 1973, but not under an exclusive referral system.

The Employer was bound by the terms of a collective-bargaining agreement between Respondent herein and other labor organizations.

The Charging Parties were discharged on July 16, 1973, in violation of Section 8(b)(1)(A) and (2) of the National Labor Relations Act.

Unrefutted testimony by the Employer's superintendent on the project reflected that the Charging Parties would have continued their employment until completion of the job. At the time of the original hearing, the Employer was working on the 24th floor of the 40-floor building.[3]

The cutoff date for backpay appears in the backpay specification on September 30, 1974, the last date the Charging Parties would have been able to work for the Employer on the project, but for the discrimination suffered by them. Board Agent Peggy Ueda, a member of the compliance team, testified how the above date was arrived at and how backpay was determined. Her figures remained uncontroverted.

In its answer to the backpay specification, Respondent sets forth eight defenses, although there is an overlapping of some.

1. Backpay is not computed in accordance with the First Circuit Court of Appeals and the Board.

Initially the court granted permission for review, vacated the Order of the Board, and remanded the case back to the Board for further proceedings. Then, after the Board's Supplemental Decision and Order, the court issued a Decision on the Charging Parties' petition for review, granting the petition and again remanding the case back to the Board. Finally, the court granted summary judgment and enforced the Board's Second Supplemental Decision and Order. The court did not address itself to any computations or make any references to the period of backpay liability.

Accordingly, I conclude that there is no merit to this defense.

2. The backpay specification is not in accordance with the *F. W. Woolworth Company* criteria, 90 NLRB 289 (1950).

3. Backpay in the case of Ventresca should cease upon his employment with Jefferson Construction Company on July 22, 1973, and backpay in the case of Frattaroli, with Turner Construction Company, should cease on or about September 2, 1973.

4. Subsequent to the termination of the Charging Parties, "The Respondent Union and its representatives took absolutely no action that in any way interfered with the employment relationship of the Charging Parties."

5. There is no legal or equitable basis for using September 30, 1974, the date of completion of the project by the employer, as the cutoff date for the backpay liability.

6. "Even assuming, *arguendo*, that the Regional Director's theory of this case is lawful, the Specification is incomplete and inaccurate and fails to account for all of the Charging Parties' outside earnings or interim earnings, as they are so described."

Essentially, Respondent contends that prior to September 30, 1974, the Charging Parties were in fact already working within the jurisdiction of Respondent for contractors who were covered by this area collective-bargaining agreement and were working with the knowledge and approval of Respondent. Stated another way, Respondent argues that backpay liability should cease when the Charging Parties got jobs for employers under contract with Respondent.

Prior to *Sheet Metal Workers Union Local 355, Sheet Metal Workers International Association, AFL-CIO (Zinsco Electrical Products)*, 254 NLRB 773 (1981) *and Iron Workers, Local 118, etc. (Pittsburg Des Moines Steel Company), AFL-CIO*, 257 NLRB 564 (1981), the two cases cited by Respondent in support of this argument, the Board applied the rule set forth in *Pen and Pencil Workers Union, Local 19593, AFL (Parker Pen Company)*, 91 NLRB 883 (1950). In that case a union's backpay liability was tolled 5 days after it notified both the Employer and the employee that it no longer objected to the employee's reinstatement. It is noted that in the latter cases the discharges were refusals to refer members to work because they refused to pay dues pursuant to union-security clauses. The case herein does not involve an exclusive hiring hall or referral system, nor were the discriminatees seeking referral.

In the *Sheet Metal Workers* and the *Iron Workers* cases, the Board stated, "The union shall be required to make the employees whole for all losses of wages and benefits suffered by the employee as the result of the union's discrimination against the employee until the employee is either reinstated by the employer to his or her former or substantially equivalent position or until the employee obtains substantial employment elsewhere."

Although the Board, applying the *Pen and Pencil* standards, affirmed Administrative Law Judge Dyer's order, and ordered Respondent to, *inter alia*, notify the Employer in writing, with a copy to the Charging Parties, that it has no objection to their employment, Respondent has presented no evidence of compliance therewith.

The cases cited by Respondent issued in 1981. The Board's Order in this case and the backpay specification both issued prior to 1981 Therefore, it is my opinion that the law of the *Pen and Pencil* case is applicable. I therefore conclude that the backpay period should extend from July 16, 1973, through September 30, 1974, the date that the employment of the Charging Parties would have ceased as a result of their employer completing the Shawmut Bank project. Moreover, Respondent has not even complied with those later cases which it argues

[3] See 216 NLRB 568, *supra*, G.C. Exh. 1(a), p. 7.

should be the law of this case. There is no evidence that Respondent affirmatively requested the Employer to reinstate the Charging Parties—a standard required by those cases.

Both of the discriminatees were present in the hearing room and were called to testify by Respondent. No evidence was elicited either through testimony or documentation, which reflects either inaccuracies, the failure to subtract interim earnings, or nondisclosed interim earnings.

The *Woolworth* case, *supra*, stands for the proposition that computations of backpay minus interim earnings are made on the basis of each separate calendar quarter. Accordingly, earnings in one particular quarter have no effect upon the backpay liability for other quarters. The backpay specification herein appears to be totally consistent with the criteria set forth in the *Woolworth* case.

Based on the testimony by the Board agent, and the backpay specification itself, in my opinion the Charging Parties were properly made whole by granting them backpay in the amount of what they would have earned at the project[4] but for the discrimination, less any earnings from any interim employment.[5] Moreover, the Board agent made specific allowances for periods when no cement work was being performed.

Accordingly, as Respondent produced no witnesses who could provide evidence reflecting inaccuracies in the backpay specification, I find and conclude that Respondent's answers 2 through 6 are nonmeritorious.[6]

7. The backpay specification violates the Employment Retirement Income Security Act (the ERISA) by requiring Respondent to make contributions to a pension plan on behalf of the Charging Parties, since they worked no hours. Pension payments are not required or mentioned by the Administrative Law Judge in the remedy provision of his Decision.

This argument also fails for in Administrative Law Judge Dyer's Decision, as affirmed by the Board, there is the reference to backpay and "other losses such as seniority." In *Philander Smith College*, 246 NLRB 499, fn. 1 (1979),[7] the employees appealed the Administrative Law Judge's failure to include in his make-whole remedy a specific provision requiring the respondent to make contributions to its pension plan. The Board stated "it is well-established that the term 'backpay,' as used by the Administrative Law Judge in his make-whole provision, covers not only wages, but benefits as well, including medical expenses . . . and pension plan contributions."

Nor does Respondent cite any authority in the ERISA law requiring the proposition that the Board may not order back payments to a pension fund as part of its make-whole remedial order. Accordingly, I find and conclude that Respondent's seventh defense is without merit.

8. In Administrative Law Judge Dyer's remedy[8] he specifies 6 percent interest per annum and "it is unlawful to require dfferent or additional interest payments." In 1977, the Board in *Florida Steel Corporation*, 231 NLRB 651, determined to adopt the varying rate of the Internal Revenue Services' "adjusted prime rate" as the Board's interest rate.

The Board's Order herein, on the substantive issues, was forthcoming in 1979. Therefore, in my opinion, *Florida Steel* is the law of this case. In *Sargent Electric Company*, 234 NLRB 1292 (1978),[9] there is the qualification that the method of arriving at an interest rate as in *Florida Steel* is not applicable in those cases in which an earlier order of the Board providing for a different rate had been enforced by a court of appeals. The court of appeals has already enforced the Board's 1979 Order herein. The Board, apparently overlooking the change in the interest rates, failed to provide for the adjustment.

I will recommend that interest be computed in the manner prescribed in *Florida Steel, supra*. I also adopt the backpay specification as issued.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

SUPPLEMENTAL ORDER[10]

The Respondent, Boston Cement Masons and Asphalt Layers Union Local 534, a/w Operative Plasterers and Cement Masons International Association, AFL-CIO, its officers, agents, and representatives, shall:

Pay Peter Frattaroli $11,726.67 as total net backpay, and pay Enrico P. Ventresca the sum of $10,538.82 as total net backpay. In addition to these amounts, pay interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289, and *Florida Steel Corporation*, 231 NLRB 651.[11]

[4] Through September 30, 1974.

[5] A good proportion of their interim jobs were of short duration. This is another basis for not tolling backpay accordant with Respondent's contentions.

[6] Respondent produced John F. O'Neill who, in 1973, was Respondent's business agent. He testified, *inter alia*, and generally, that the individuals utilized by the compliance team as "models" in determining retention on the job by the Charging Parties were improper, because they enjoyed superseniority. This is at variance with the Board decision, based partly on the testimony of the Employer's superintendent, who testified that the Charging Parties would have been retained until the completion of the job. Accordingly, I find that the method employed by the compliance team was equitable and consistent with the Board decision in the unfair labor practice case.

[7] See fn. 1.

[8] Decision dated May 30, 1974.

[9] See fn. 3.

[10] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[11] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).